

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

DANNY L. SMITH, #176952,

Plaintiff,

v.

J.C. GILES, et al.,

Defendants.

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CASE NO. 3:11cv608-WHA

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ORDER

On July 12, 2017, the Magistrate Judge entered a Recommendation that the Plaintiff, Smith, be denied relief from final judgment under Rule 60(b)(4) (Doc. #38). The Plaintiff filed an Objection to the Report and Recommendation.

After *de novo* review of the objection and the file in this case, the court finds the Objection to be without merit.

Smith objects that the Magistrate Judge mischaracterized his claim challenging the integrity of the proceedings on his §2254 petition. The Magistrate Judge's characterization, however, is consistent with Smith's argument in his Rule 60(b) motion. (Doc. # 34, p.2-7). For the reasons stated in the Magistrate Judge's two recommendations (Doc. #38 and #24), the argument lacks merit.

Smith tries to characterize his Rule 60(b) claim as one based on "new evidence" that the State, sometime after his 2254 case, stated in one of its filing in a state court proceeding that incest is not a lesser included offense of rape. He maintains this alleged later concession means that the State, in his 2254 action, misrepresented to this court that his incest conviction was included in the charge in the indictment. However, whether Smith has new evidence related to

his state court jurisdictional claim is immaterial to whether there is an exception to the AEDPA limitation period for claims alleging lack of jurisdiction by the state trial court. Furthermore, the previous finding that Smith's §2254 petition is time-barred was not based on the State's position in that proceeding regarding incest as a lesser included offense of rape.

Accordingly, it is ORDERED as follows:

1. The court adopts the Recommendation of the Magistrate Judge and the Objection is OVERRULED.
2. The Motion for Relief from Judgment (Doc. #34) is DENIED.

DONE this 12th day of September, 2017.

/s/ W. Harold Albritton

W. HAROLD ALBRITTON

SENIOR UNITED STATES DISTRICT JUDGE